92-606

No. 92-

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In The

Supreme Court of the United States

October Term, 1992

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, an unincorporated association, BEN OCHOA, GENERAL CHAIRMAN, E. R. SPEARS, GENERAL CHAIRMAN, PAUL S. SWANSON, GENERAL CHAIRMAN, and BRUCE G. GLOVER, GENERAL CHAIRMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 7, 1992

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QUESTION PRESENTED FOR REVIEW

WHERE A UNION STRIKES OVER A MINOR DISPUTE IN VIOLATION OF THE RAILWAY LABOR ACT, 45 U.S.C. §§ 152 FIRST AND 153 FIRST (i), IS THE EMPLOYER'S IMPLIED RIGHT OF ACTION ENFORCEABLE BY MONETARY REMEDIES?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

All parties to the proceeding below are identified in the caption of this petition.

Burlington Northern Inc., is the parent company of petitioner, Burlington Northern Railroad Company. The partially owned subsidiaries of petitioner Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Northern Radio Ltd.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Burlington Northern Railroad Company ("BN") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 22, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported: *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86 (5th Cir. 1992), and the opinion is set forth in the Appendix ("App.") at 1a-10a. The order of the United States District Court for the Northern District of Texas is not reported. It is attached at App. 11a-12a.

JURISDICTION

The judgment and opinion sought to be reviewed was entered by the Fifth Circuit Court of Appeals on May 22, 1992. The petitioner's Suggestion for Rehearing *En Banc* was treated by the Fifth Circuit as a petition for rehearing and suggestion for rehearing *en banc*, which was denied on July 9, 1992. This order is set forth at App. 13a-14a. This Court has jurisdiction to review the judgment of the Fifth Circuit under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

a) Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First (App. 15a) states that:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to

> commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

b) Section 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i) (App. 16a), states:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

STATEMENT OF THE CASE

This case concerns the nature of relief that may be awarded for violations of Sections 2 First and 3 First (i) of the Railway Labor Act ("RLA" or "the Act"), 45 U.S.C. §§ 152 First and 153 First (i). Though Congress has not expressly provided for a cause of action for violations of those sections of the RLA, this Court previously found an implied right of action under Sections 2 First and 3 First (i). *Chicago & N. W. Ry. v. United Transp. Union*, 402 U.S. 570 (1971) (*"Chicago & North Western"*); *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957)

("*Chicago River*"). Furthermore, this Court has stated that Section 2 First should be "enforceable by whatever appropriate means." *Chicago & North Western*, 402 U.S. at 578.

Notwithstanding this Court's holdings in *Chicago & North Western* and *Chicago River*, the court below held that there was no cause of action for damages to enforce violations of those two sections. 961 F.2d at 89. This case provides the opportunity for this Court to definitively state for the lower courts that the implied right of action in Sections 2 First and 3 First (i) supports a claim for relief by whatever means appropriate, including a monetary remedy. This case also provides an opportunity for this Court to address an illogical asymmetry within the lower courts: unions may be awarded the full range of relief, including damages, for a carrier's violation of its duties under the RLA, but carriers are not allowed this full range of remedies when a union violates its duties under the RLA. No sound policy or decision by this Court supports such unequal enforcement of duties under the RLA.

A. Course of Proceedings and Dispositions Below:

On June 26, 1990, at 2:30 a.m. BN obtained a temporary restraining order issued by the United States District Court for the Northern District of Texas, Fort Worth Division, against an imminent strike by the Brotherhood of Maintenance of Way Employes and the named officers ("BMWE"). The district court had jurisdiction under 28 U.S.C. § 1331 and 45 U.S.C. §§ 2 First and 3 First (i). In its complaint, BN sought full equitable relief, including preliminary and permanent injunctive relief to stop the

strike, and monetary relief for the expenses it incurred as a direct result of the unlawful strike. After a full evidentiary hearing, the district court granted BN's motion for a preliminary injunction against BMWE's strike action. The Court found that there was a substantial likelihood that the dispute between BN and BMWE was a minor dispute under the RLA. No appeal was taken by BMWE.

On January 9, 1991, BN moved for summary judgment requesting the court to award full equitable relief, including a permanent injunction against the strike and monetary relief for the expenses incurred in responding to the unlawful strike. On February 6, 1991, BMWE filed a motion to dismiss BN's claim for monetary relief. On February 14, 1991, the district court granted BN's motion for summary judgment with respect to the permanent injunctive relief, but denied BN's motion with respect to its claim for monetary recovery. On March 7, 1991, the court issued an order granting BMWE's motion to dismiss BN's claim "for damages or other monetary relief." App. 11a-12a. On March 21, 1991, the court amended the ordering paragraphs of the permanent injunction order. No appeal of any of the orders of the district court has been taken by BMWE.

BN appealed the court's order dismissing its claim for monetary relief. Because the district court found *Louisville & Nashville Railroad Company v. Brown*, 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958) (*"Brown"*), controlling, BN filed a Suggestion for Hearing En Banc. It was denied on October 29, 1991, by a panel of the Fifth Circuit. A different panel held on the merits that *"Brown* controlled the disposition of this case." 961 F.2d at 89.

On July 9, 1992, the Fifth Circuit treated BN's Suggestion for Rehearing En Banc as a petition for rehearing and suggestion for rehearing *en banc* and denied it. Within ninety days from the denial of the petition for rehearing, Petitioner has filed this petition for writ of certiorari.

B. Railway Labor Act Framework:

Congress established distinct dispute resolution mechanisms based on the nature of the dispute between the employees' representatives and the carriers. The characterization of the dispute determines the mechanism the parties are to employ in resolving the dispute. There are two types of disputes: major and minor. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 303 (1989) ("*Conrail*"); *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 724 (1945), *reaff'd on reargument*, 327 U.S. 661 (1946). The distinction between a "major" and a "minor" dispute is crucial; it determines not only the degree to which a federal court may become involved in a dispute, but also the legality of strike conduct by the employees and their unions.

Under the RLA, the parties in a major dispute seek to create contractual rights. They are required to preserve the status quo until they have exhausted a series of non-binding settlement procedures. 45 U.S.C. § 156. After the exhaustion of those procedures, the parties to the dispute are free to use all available self-help. On the other hand, in a minor dispute, the parties seek to enforce existing contractual rights. The parties are governed by Sections 2 First, Sixth and Section 3 of the RLA which, after negotiation, compels resolution by binding arbitration of the

contractual dispute. In a minor dispute, the union is never free to resort to economic self-help measures such as strikes. *Conrail*, 491 U.S. at 303; *Chicago River*, 353 U.S. at 41-42.

C. Facts:

In the early morning hours of June 26, 1990, BMWE commenced a 24-hour work stoppage and picketing at many BN facilities over a major portion of BN's railroad. Though BN had met and exchanged correspondence with officers of BMWE over the contractual justification for contracting the clipcar, BMWE still called a strike against BN. The clipcar was a newly developed machine to install rail clips and insulators in the process of laying concrete ties. 961 F.2d at 87. BN argued that it was entitled to contract out this work under its collective bargaining agreement with BMWE (Schedule Agreement). BMWE argued, under the terms of a different collective bargaining agreement called the P811-S Agreement, that BN could not contract out this work. 961 F.2d at 87.

Instead of proceeding to compulsory arbitration under Sections 2 First, Sixth and 3 First (i) of the RLA, BMWE took a strike vote of its members. Without any warning to BN, BMWE advised its members to walk off their positions or not to report for duty at approximately 5:30 a.m. to 6:00 a.m. on June 26, 1990. (Rec. 266). BMWE employed a public relations firm to assist in its effort to publicize its work stoppage against BN. (Rec. 324, 338 [attachment A]). Shortly after the strike started, the public relations firm issued a press release stating the strike

was a "public protest." (Rec. 324, 338 [attachment A]). In a letter to media and civic leaders, BMWE stated that it had taken a "more aggressive approach" because "compromise was not working nor was arbitrating the issue. . . . " (Rec. 328). BMWE then publicized its success to its members by claiming that normal railroad operations were seriously disrupted: "We should consider this a victory!" (Rec. 235, 263).

Such striking and picketing by BMWE was found by the district court to be unlawful because it involved a minor dispute under the Railway Labor Act. The strike activity was both preliminarily and permanently enjoined. (Rec. 296, 872). BMWE did not appeal this finding.

This unlawful strike resulted in severe disruption to BN's train operations and other services. Despite the severe disruption, BN tried to operate during the strike in an attempt to fulfill its legal obligations as a common carrier. BN incurred direct expenses of approximately $100,000 as a result of BMWE's striking and picketing. These expenses represent costs incurred for lost productivity, train and switching delays, overtime wages paid to non-BMWE represented employees who were held over because of the strike, and travel expenses for exempt BN employees who had to be relocated to trouble-spots in order to facilitate operations during the strike.

D. Decision Below:

When BN sought to redress the union's violation of the RLA through a claim for monetary relief, the district court dismissed its claim and the Fifth Circuit affirmed.

The court below held, on the basis of *Brown*, that there was "no cause of action under the Railway Labor Act for damages caused by an illegal strike." 961 F.2d at 89. The court felt bound to follow *Brown* because there was no "Supreme Court decision holding that monetary relief is available for breach of the § 152 First duty." (footnote omitted) 961 F.2d at 89. In its view, neither *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S. Ct. 1028 (1992) ("*Franklin*") nor *Chicago & North Western* controlled the question as to the type of relief available to support an implied cause of action for violations of §§ 2 First and 3 First (i) of the RLA. Thus, the panel felt "bound to follow the holding in *Brown*." 961 F.2d at 89.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The question presented by this case is whether the implied right of action in Sections 2 First and 3 First (i) of the RLA supports a claim for monetary relief under the decisions of this Court. The question is important to the proper development of the appropriate remedies for violations of the RLA.

The decision below abruptly stops that development by confusing the distinction between implied causes of action and the respective appropriate remedies. At the time of enactment of the RLA, the Congressional intent was to create legal obligations under the law, while allowing the remedies to be developed on a case-by-case basis. This Court has stated that there is an implied cause of action under the RLA to address violations of Sections

2 First and 3 First (i), and has directed lower courts to enforce those violations by "whatever appropriate means." *Chicago & North Western*, 402 U.S. at 578. In its recent decision in *Franklin*, this Court reaffirmed the general rule that the federal courts have the power to award any appropriate relief in a cognizable cause of action unless Congress indicates otherwise. Unless this Court confirms that this principle applies to the implied right of action recognized in *Chicago & North Western* and *Chicago River*, the decisions of the lower courts will continue to curtail the development of the law of remedies under the RLA.

This issue is of great importance to the rail and airline industries, their employees, and the labor organizations representing those employees, all of which are governed by the RLA. Limiting the carriers to injunctive relief has not discouraged the unions from unlawfully striking over minor disputes. Thus, the unions have been free to bring economic havoc on the carrier and the public, while the air and rail carriers' only recourse is to minimize the economic destruction by racing to the courts for injunctive relief. That remedy has not deterred the employees and their unions from violating the major purpose of the RLA: avoidance of interruption to the carrier's operations and to commerce. Providing the lower courts with the full range of remedies will promote the Congressional intent that minor disputes be peacefully resolved through the compulsory arbitration mechanism in the RLA.

Moreover, denial of a damages remedy to employers – when that same remedy is available to other parties – distorts the statutory intent. The court below sanctioned such an improper asymmetry by finding that unions are

allowed to recover damages for violations of Section 6 of the RLA, but carriers are not allowed to recover damages under Sections 2 First and 3 First (i). There is no statutory authority for such a distinction.

Furthermore, the resulting dichotomy cuts against this Court's teaching in *Chicago & North Western*, that Section 2 First is the "heart" of the RLA. If the courts refuse to allow all available remedies to enforce the "heart" of the RLA, but allow such remedies to enforce other sections, then the proper administration of the RLA will falter. This writ of certiorari should be granted to clear up this confusion and stop the asymmetrical development of the law of remedies under the RLA.

I. The Decision Below Rests on a Precedent Whose Bases are no Longer Valid.

This case presents a situation in which the dispositive rule of law was established in a precedent whose doctrinal foundations have been entirely eroded. The Fifth Circuit held that its *Brown* decision controlled the disposition of this case. 961 F.2d at 89. The court gave no rationale for the continued validity of the 34-year-old decision in *Brown*, other than to say that there were no Supreme Court decisions which held that damages were available for a breach of Section 2 First. 961 F.2d at 89. The Fifth Circuit did not explain why the result in *Brown* represented a sound interpretation of the RLA, but merely reflected that in the absence of contrary precedent from this Court, "this panel is bound to follow the holding in *Brown*." 961 F.2d at 89.

Other courts have also found the Fifth Circuit's *Brown* decision controlling. In *National Airlines v. Airline Pilots Association International,* 431 F. Supp. 53 (S.D. Fla. 1976), the court followed *Brown* to find there was no right of action for compensatory damages for a breach of Section 2 First when the union had engaged in bad faith bargaining.

In *CSX Transportation v. Marquar,* No. 90-399, slip op. (E.D. Ky. 1991), *appeal pending,* No. 91-5689 (6th Cir.) (the opinion is set forth in Appendix F at 17a to 21a), the court was faced with a union unlawfully striking over a minor dispute; in all respects, the court noted, this case is indistinguishable from the instant case. (slip op. at 4; 19a). The court recognized that although there were "very valid arguments, supported by the legislative history and fairness concerns, in favor of allowing damages," it was "not in a position to allow such relief." (slip op. at 4; 21a).

Brown stands as a roadblock to lower courts seeking to develop proper remedies under the RLA. However, the reasoning of *Brown* is no longer valid. *Brown* had three bases: (1) because the NLRA had express damage provisions and the RLA did not, Congress intended no damages under the RLA; (2) the civil rights statutes without express remedy provisions, like the RLA at the time, were construed as not allowing damages; and (3) state law allowed a compensatory damages remedy. None of these bases is sound any longer.

This Court has repeatedly admonished that the RLA was not drafted with the same policies or design as the

NLRA. Analogies or comparisons with the NLRA "should be drawn with the utmost care and with full awareness of the differences between these statutory schemes." *Chicago & North Western*, 402 U.S. at 579 n.11.

The RLA was intentionally designed without specific remedies, and the drafters intended that the federal courts enforce and develop appropriate judicial remedies on a case-by-case basis. *Chicago & North Western*, 402 U.S. at 579-81. On the other hand, under the NLRA, Congress set forth detailed provisions regarding specific proscribed activities, established an agency to determine violations of and remedies for violations of those provisions, and permitted direct court action for breaches of collective bargaining agreements. 29 U.S.C. § 151, *et seq.* *Brown's* rationale, that when Congress wanted to set forth a specific remedy in a labor-management statute it knew how to do so, is without merit due to the differences in the schemes between the NLRA and the RLA; and it is particularly unsound in light of the RLA drafters' declared intent and this Court's adoption of such intent. *Chicago & North Western*, 402 U.S. at 876-77.

Brown also compared the absence of a damages remedy under the RLA to the express damage remedies under certain civil rights statutes, 42 U.S.C. §§ 1983, 1985, and 1986. 252 F.2d at 155. *Brown*, again, rationalized that where Congress intended a damages remedy, it had specifically set forth rights of action under those statutes. 252 F.2d at 155. This analogy suffers from the same defects as the panel's analogy to the NLRA, and the blurring of the distinction between rights of action and remedies.

However, since *Brown*, for those civil rights statutes, 42 U.S.C. §§ 1981 and 1982, which do not have express remedies provisions, this Court has held that though Congress did not set forth a specific remedy for violations of those statutes, a damages remedy is available. *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969). Particularly relevant here is that the *Sullivan* Court relied upon this Court's decision in *Texas & New Orleans Railroad v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930) ("*Railway Clerks*"), as support for its reasoning that the mere absence of a remedy in a statute does not prohibit the imposition of a remedy by the courts. In *Railway Clerks*, this Court not only found an implied right of action for violation of Section 2 Third of the RLA, but also held that all remedies were available even though the RLA had not expressly stated a remedy. 281 U.S. at 569.

The last basis for *Brown's* decision was the availability of state law remedies. 252 F.2d at 156. The law of preemption has swept away this basis. Even *National Airlines* found that the carrier's state law claims were preempted by the RLA. 431 F. Supp. at 55-56. To the extent that *Brown* depends on the availability of such state law remedies as support for its holding that monetary relief was not available under the RLA, that support is also not sound.

The Fifth Circuit's decisions in *Brown* and in this case have essentially blocked the evolution of the law of remedies under the RLA. Yet, the doctrinal foundation for this line of cases has been entirely eroded. Review in this Court is necessary to permit a fresh and sound approach to the important issue raised here.

II. The Decision Below Conflicts with this Court's Decisions Finding an Implied Cause of Action Under the RLA to Enforce Sections 2 First and 3 First (i).

A. The Railway Labor Act Creates Implicit Causes of Action for Enforcement of the Act's Various Duties and Obligations.

This case is significant to both the rail and airline industries, in that it concerns one of the most important purposes of the RLA. One of the major purposes of the Act is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a(1); *Railway Clerks*, 281 U.S. at 565. To prevent strikes, the RLA imposes various reciprocal obligations upon rail carriers, their employees, and their employees' representatives.

The RLA mandates, under Section 2 First, that it is the duty of the union "to avoid any interruption to commerce or to the operation of any carrier . . . . " 45 U.S.C. § 152 First. The duties under Section 2 First of the RLA were "designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis." *Chicago & North Western*, 402 U.S. 570, 577 (1971). The Court has also stated that this duty is the "heart" of the RLA. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969), *reh'g denied*, 394 U.S. 1024 (1969). Thus, the Court found an implied cause of action existed under Section 2 First.

Additionally, this Court has recognized that, under the RLA, Congress imposed upon the unions and rail

carriers a Section 3 First (i) duty to resolve minor disputes by binding arbitration and not by self-help. In *Chicago River*, this Court found there was an implied cause of action under Section 3 First (i) which is enforceable by the issuance of an injunction against a threatened strike. *See also Conrail*, 491 U.S. at 303.[1]

Thus, it is beyond dispute that from the language in the RLA creating rights and duties, this Court has recognized implied causes of action for the enforcement of various RLA duties, including Sections 2 First and 3 First (i). *See Cannon v. University of Chicago*, 441 U.S. 677, 691 n.13 (1979). Thus, the sole inquiry is what remedies are available under the RLA to enforce violations of these sections. The general rule this Court has employed is that all remedies are available unless Congress explicitly indicated otherwise. *Davis v. Passman*, 442 U.S. 228, 246-47 (1979). As will be demonstrated in part "B" below, Congress' silence with respect to the remedies for violations of RLA duties was not intended to minimize or undermine the importance of those duties, nor to limit available judicial remedies for their enforcement. Rather, Congress intended for the courts to perform their traditional duty of crafting RLA remedies appropriate to the particular facts and circumstances of each case. This is in keeping

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[1] The airlines do not have a national arbitration board. Rather, Congress provided that airlines and unions should establish arbitration boards by agreement under Section 204 of the RLA. 45 U.S.C. § 184. This Court has found an implied cause of action under Section 204. *Machinists v. Central Airlines*, 372 U.S. 682 (1963), *reh'g denied*, 373 U.S. 947 (1963).

with this Court's longstanding rule that where an implied cause of action exists under the laws of the United States, and Congress does not specify the remedy, courts are empowered to award any appropriate relief. *Bell v. Hood*, 327 U.S. 678 (1946). Because the Fifth Circuit ignored this longstanding rule, this Court should grant the writ of certiorari to allow for the proper development of remedies for the violation of duties under the RLA.

B. Congress has Provided Courts with Discretion to Fashion Appropriate Remedies for Violations of the Railway Labor Act.

The RLA, with a few minor exceptions,[2] does not provide express penalties, relief, or remedies for violations of its substantive provisions. As a result of the lack of express statutory language regarding remedies, in those cases where this Court has recognized implied rights of action under the RLA, the Court has also recognized the general rule. According to that rule, when there is an implied right of action, all appropriate, traditional remedies are presumptively available.

In *Railway Clerks*, this Court established the principle that the absence of express remedies in the RLA did not imply any Congressional limitation on enforcement remedies:

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[2] For instance, the RLA provides for specific remedies for enforcement of adjustment board awards, 45 U.S.C. § 153 First (p) and (q), and enforcement of interest arbitration awards, 45 U.S.C. § 159.

> The absence of a penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, . . . but . . . a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each . . . The right is created and the remedy exists (citations omitted).

281 U.S. at 569-70. There, the Court implied a cause of action for violation of Section 2 Third of the RLA. *See Davis*, 442 U.S. at 239 n.17. This Court reaffirmed the availability of remedies in *Virginian Railway Company v. System Federation No. 40*, 300 U.S. 515 (1937), for a violation of Section 2 Ninth of the RLA.

In *Steele v. Louisville & Nashville Railroad Company*, 323 U.S. 192, 203 (1944), this Court further defined the breadth of judicial relief available for violations of the RLA's statutory commands:

> For the present command there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected. . . . We conclude that the duty which the statute imposes . . . and that the statute contemplates resort to the *usual judicial remedies of injunction and award of damages* when appropriate.

323 U.S. at 207 (emphasis added). There, an implied cause of action against the unions for breach of the duty of fair representation was found for violation of Section 2 Fourth.

Of particular importance here are this Court's decisions in *Chicago River* and *Chicago & North Western*. In the latter case, the Court instructed federal courts to enforce the legal obligations of Section 2 First of the RLA "by whatever means might be developed on a case-by-case basis." 402 U.S. at 577.

This Court found support for allowing the full range of remedies to be utilized by the lower courts from the legislative history of the Act. The *Chicago & North Western* Court pointed out that the Railway Labor Act of 1926 was an agreement worked out between management and labor and ratified by the Congress and the President. 402 U.S. at 576. "Accordingly, the statements of the spokesmen for the two parties made in the hearings on the proposed Act are entitled to great weight in the construction of the Act." 402 U.S. at 576 n.7. This Court quoted from the testimony of Donald R. Richberg, counsel for the organized railway employees, stating the reasons why the Railway Labor Act was drafted in general language applicable equally to both parties, rather than in terms of specific requirements or prohibitions accompanied by explicit sanctions. Mr. Richberg stated that railroad labor relations would best be served by letting courts craft appropriate remedies in the same manner "in which the common law has developed in England and America." 402 U.S. at 577.[3]

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[3] In yet another passage of the hearings on the 1926 RLA, Mr. Richberg testified that the RLA's silence should not lead to the absence of remedies for violations of the Act:

> We have avoided in the bill in any way setting up any penalty section or any sections for the invocation of any judicial authority, except in the enforcement of an

The "common law" envisioned by the drafters allowed courts to craft appropriate remedies for violations of clear statutory duties. Indeed, this Court has repeatedly subscribed to this principle in the century prior to the enactment of the RLA.[4]

> arbitration award. The thought being this, that so far as this law stated duties imposed upon the parties by act of Congress, if they failed to live up to their duties, and there was any action which a court could take consistent with its powers and its limitations, to compel the enforcement of that duty as a legal obligation, it would be subject to enforcement. But the law for such enforcement or compulsion should be developed in the courts, according to the old common law theory of letting the courts develop the law after the obligations are clearly understood, rather than to write into the law a specific line of penalties and writs of enforcement.

Hearings on Railroad Labor Disputes Before the House Committee on Interstate and Foreign Commerce, H.R. 7180, 69th Cong., 1st Sess., p. 40 (January 26, 1926).

[4] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (" '[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded' ") (*quoting* 3 W. Blackstone, *Commentaries* 23); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 624 (1838) ("It cannot be denied but that Congress had the power to command that act to be done; and the power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist"); *Pollard v. Bailey*, 87 U.S. (20 Wall.) 520, 527 (1874) ("A general liability created by statute without a remedy may be enforced by an appropriate common-law action"); *De Lima v. Bidwell*, 182 U.S. 1 (1901) ("If there be an admitted wrong, the courts will look far to supply an adequate remedy").

Thus, when this Court stated in *Chicago & North Western*, that the duties and obligations of the RLA should be enforced "by whatever means might be developed on a case-by-case basis," 402 U.S. at 577, the Court was applying the longstanding rule that when a statute creates a cause of action and is not specific as to a remedy, the courts may fashion any appropriate remedy. One of those appropriate remedies is monetary relief. This is the principle that should have been found controlling here. Just last term this Court, in *Franklin*, strongly reaffirmed that rule.

C. The Decision of the Court Below Limiting the Available Judicial Remedies for Violations of the RLA is Inconsistent with the Principles Enunciated by this Court Concerning Enforcement of Statutory Rights When the Statute does not Provide Specific Remedies.

In *Franklin*, this Court stated that it will "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." 112 S. Ct. at 1032 (*citing Davis v. Passman*, 442 U.S. 228, 246-47 (1979)). The Court then recognized that the history of this legal presumption "has deep roots in our jurisprudence." 112 S. Ct. at 1033. Thereafter, the Court summarized:

> The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.

112 S. Ct. at 1035.

The Fifth Circuit erroneously rejected this Court's "general rule" in the decision below.[5] Rather than applying this Court's general rule, the court reaffirmed its *Brown* decision which held that "a carrier had no *cause of action* under the Railway Labor Act for damages caused by an illegal strike." 961 F.2d at 89 (emphasis added). The court did not try to reconcile this result with its recognition that there was an implied cause of action for an injunctive remedy against a union's illegal strike under the same section of the RLA. 961 F.2d at 88-89, and n.12. Insofar as the opinion confuses the distinction between an implied cause of action and the available remedies, it is at odds with this Court's decision in *Franklin*. 112 S. Ct. at 1032.

The court below cited no statutory basis for its holding that the remedy available to a carrier for a union's breach of its Section 2 First and 3 First (i) duty does not include monetary relief. In *Franklin*, however, this Court performed a probing analysis of the statute in question to determine whether Congress intended to limit application of the "general rule" and place some implicit limit on the remedies available. The Fifth Circuit's decision demonstrated no such analysis. In fact, any such analysis would find no limit because the drafters of the RLA

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[5] The Fifth Circuit did recognize the existence of the decision in *Franklin* in passing. 961 F.2d at 89 n.9. Yet, the court's analysis was limited to the statement that "[a]gain, even if this court were considering the issue on a clean slate, *Franklin* would not control." *Id.*

intended for the courts to have available all remedies for enforcement of violations of the Act. The court below failed to recognize that the issue of what remedies are available is analytically distinct from the issue of whether a right of action exists in the first place. 112 S. Ct. at 1032 (*citing Davis v. Passman*, 442 U.S. 228, 239 (1979)). For these reasons, it would be appropriate to grant the writ of certiorari in this case.

III. There are Neither Policy nor Statutory Bases for the Decision of the Court Below Which Recognized a Dual Standard Under the RLA, Whereby Unions May Obtain a Monetary Remedy From a Carrier, but a Carrier May not Obtain Such a Remedy From a Union.

In its arguments to the court below, BN urged that certain Fifth Circuit decisions had recognized that a monetary remedy could be awarded under the Act. 961 F.2d at 88 (*citing United Indus. Workers of the Seafarers Int'l Union v. Board of Trustees of Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969) ("*Galveston Wharves*"). In *Galveston Wharves*, the Fifth Circuit awarded back pay to employees who were wrongfully discharged when the carrier unilaterally altered the terms of an agreement without following the procedures dictated by Section 156, 45 U.S.C. § 156. The court below distinguished *Galveston Wharves* solely on the ground that it involved a different section of the RLA, Section 156. Given that there is no statutory basis for distinguishing between the remedies which are available under Sections 152 First and 153 First (i) and those that are available under Section 156, BN submits that the Fifth Circuit's

decision recognized an inappropriate dual standard. That is, when a carrier unilaterally changes working conditions in violation of Section 156, a monetary remedy is available to the employees, but such a remedy is unavailable to the carrier when a union strikes in violation of Sections 152 First and 153 First (i). There is neither statutory basis nor sound policy for this dual standard.

Further, BN submits that this case is significant to the entire rail industry, as well as the airline industry, because if the decision below is allowed to stand, it would arm the unions with additional remedies which are not available to the carriers. This would result in an unbalanced scheme of labor relations in the railroad and airline industries. Under this skewed scheme, unions can conduct illegal strikes, such as the one in this case, with impunity.[6] The carrier's only remedy, under the rule announced by the court below, is to obtain an injunction as swiftly as possible to prohibit the union from doing that which was unlawful. Until the carrier is able to obtain an injunction, the union is free to impose economic

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[6] In this case, the object of the union's strike was not for any other lawful purpose. Rather, BN submits the purpose of this strike was a public protest. This contention is evidenced by the fact that the union's strike was called for only a short (24 hour) duration and was heavily publicized by a professional public relations firm. Statements made in the union's press release indicated that the strike was called because "compromise was not working nor was arbitrating the issue . . . " (Rec. 328).

havoc on the carrier without fear of any sanction.[7] Even after obtaining the injunction, the carrier continues to shoulder the economic loss. There is nothing in the language of the RLA or the rationale of this Court's decisions to support this disparate treatment. Congress placed the mutual obligations of Sections 2 First and 3 First (i) on both the carriers and the employees or their representatives. In the current deregulated atmosphere, the carriers will suffer even more from this asymmetry.

The economic and regulatory development of the air and rail transportation industries, whose labor relations are governed by the RLA, is at a crucial juncture. Both industries, as well as the motor carrier industry, were substantially deregulated in the period 1978-1980.[8] The major policy changes brought about by deregulation are embodied, for the rail industry in particular, in the policy statement which introduced the deregulatory act. *See* 49 U.S.C. §§ 10101a(1)-10101a(15). By placing railroads in the flux of market forces, Congress strongly encouraged individualized services and pricing of those services. The expected result of this new competitive environment was that railroads would begin customizing their services to

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[7] In the instant case, the BMWE publicized its success to its members by claiming that normal railroad operations were severely disrupted: "We should consider this a victory!" (Rec. 235, 263).

[8] The airlines were deregulated by the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978); the railroads by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1897 (1980); and the motor carriers by the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980).

meet marketplace demands to the greatest extent possible. One of the natural outcomes of this process during the past dozen years has been a frequent need by the railroads to utilize the contours of their existing collective bargaining agreements and work rules in order to meet the marketplace demands. *Cf. Conrail*, 491 U.S. at 309. The union's reaction, as evidenced here by the BMWE, is to protest the RLA scheme of compulsory arbitration by striking BN over an obviously minor dispute. Without the availability of all remedies, the unions will increasingly be inclined to sidestep congressionally mandated RLA arbitral resolution mechanisms in these disputes, and resort to self-help. The decision below will be viewed as a sanction of the protest movement. By recognizing the availability of a monetary remedy for a carrier as a result of a union's unlawful self-help in a minor dispute, the Court can promote the channeling of these disputes to compulsory arbitration as mandated by Congress. *See also Conrail*, 491 U.S. at 311.

In the absence of review by this Court, the rule perceived as binding by the lower courts will continue to have an adverse affect: it will encourage both economic disruption and less utilization of congressionally mandated arbitration. Without the prospect of a monetary remedy, the unions have little reason to refrain from striking in a minor dispute. Because no monetary remedy is available, carriers are left to seek prospective injunctive relief in every such case and at the earliest possible moment. The courts are repeatedly drawn into the battle. This is not what Congress intended when enacting the compulsory arbitration procedures of the RLA. This economic disruption by the unions continues to have an adverse

affect on the public and the long-term health of these critical transportation industries.

CONCLUSION

For these reasons, a writ of certiorari should issue and the judgment and decision of the Fifth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

BURLINGTON NORTHERN RAILROAD CO., a corporation, Plaintiff-Appellant,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, an unincorporated association, et al., Defendants-Appellees.

No. 91-1440.

United States Court of Appeals,
Fifth Circuit.

May 22, 1992.

Rehearing and Rehearing En Banc
Denied July 9, 1992.

Railroad sought injunctive and monetary relief against union for illegal strike. The United States District Court for the Northern District of Texas, John McBryde, J., granted injunction but denied monetary relief. Railroad appealed. The Court of Appeals, Wisdom, Circuit Judge, held that carrier had no cause of action under Railway Labor Act for damages caused by illegal strike.

Affirmed.

* * *

Thomas J. Knapp, Lawrence M. Stroik, Charles W. Shewmake, Burlington Northern R. Co., Ft. Worth, Tex., for plaintiff-appellant.

Sanford Ross Denison, William A. Bon, Susan H. Durham, Irving, Tex., for defendants-appellees.

Appeal from the United States District Court For the Northern District of Texas.

Before WISDOM, JONES, and SMITH, Circuit Judges.

WISDOM, Circuit Judge.

The plaintiff-appellant, Burlington Northern Railroad Company ("BN"), contends that the district court erred by dismissing its demand for monetary relief. BN challenges the district court's application of *Louisville & Nashville Railroad Co. v. Brown*,[1] a decision of this Court, to the facts of this case. BN also questions the continued validity of that precedent. We affirm.

I. BACKGROUND

The defendant-appellee, the Brotherhood of Maintenance of Way Employees ("BMWE" or "the union"), is the collective bargaining representative of certain employees of BN. BMWE and BN are parties to a collective bargaining agreement that governs the hours of service, rates of pay, and working conditions of the covered employees ("the Schedule Agreement"). BMWE and BN are also parties to a supplemental agreement concerning employment of union members in the process of laying railroad ties, specifically in connection with the use of the P811-S, a machine that lays concrete ties ("the P811-S Agreement").

In March 1990, BN notified BMWE that it intended to utilize a newly developed clip and insulator installation machine ("the clipcar") in the process of laying concrete ties. BN stated that the contractor's personnel would be

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[1] 252 F.2d 149 (5th Cir.), *cert. denied*, 356 U.S. 949, 78 S.Ct. 913, 2 L.Ed.2d 843 (1958).

operating this new machine rather than BMWE members. BMWE objected to BN's plans to contract out this work, and requested a conference to discuss the matter.

During the conference held on April 5, 1990, BN argued that it was entitled to contract out this work by virtue of provisions in the Schedule Agreement that allow BN to contract out work under specified conditions. BMWE, on the other hand, stated that this work was covered by the provisions of the P811-S Agreement that require all "clipping" work to be "bulletined"[2] to BMWE members.

In May 1990, BMWE notified BN that if BN proceeded to contract out this work, the union would consider this to be a unilateral change in the P811-S Agreement.[3] BN responded that it had the right to contract out this work and that to do so would not constitute

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[2] A bulletin is the procedure whereby members of BMWE bid on jobs.

[3] In the terminology used in discussions of the Railway Labor Act, a dispute over changes in rates of pay, rules, or working conditions is a "major dispute". A dispute arising out of grievances or out of the interpretation or application of agreements concerning the rates of pay, rules, or working conditions is a "minor dispute".

Under the Act, minor disputes are subject to compulsory arbitration and the parties may not resort to self-help. Thus, a district court may enjoin a strike over a minor dispute. Major disputes are the subject of voluntary arbitration, and the parties may resort to self-help only after the procedures described in the Act have been exhausted. A strike by the union over a major dispute may also be enjoined prior to exhaustion of those procedures, unless the carrier has already violated the status quo by making a unilateral change in working conditions.

a unilateral change in any of the agreements between the parties.

BN had learned that BMWE planned to strike over this issue and filed an action against BMWE[4] seeking injunctive relief and damages. BN also moved for a temporary restraining order. The district court issued a TRO at 2:30 a.m. on June 26, 1990, enjoining the strike. On June 26, 1990, at 6:00 a.m., before being served with the TRO, BMWE initiated a twenty-four hour strike against BN in response to BN's contracting out for the clipcar work. Upon notice of the entry of the TRO, BMWE ceased all strike activity. The parties agreed to continue the TRO until after a hearing on BN's motion for a preliminary injunction.

The hearing on the preliminary injunction was held on August 20, 1990. The court, without ruling on BN's demand for monetary relief, granted the preliminary injunction. The court found a substantial likelihood that the dispute was a minor dispute under the Railway Labor Act, and that therefore BMWE could not resort to self-help.[5]

In January 1991, BN moved for summary judgment on its demands for a permanent injunction and for monetary relief. In February 1991, BMWE moved to dismiss BN's demand for monetary relief. On February 14, 1991,

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[4] The complaint also named as defendants several individual officers of BMWE. For convenience, the defendants will be referred to collectively as "BMWE".

[5] The parties have not appealed any of the court's rulings with respect to the preliminary injunction.

the district court granted BN's motion for summary judgment with respect to the permanent injunction, but denied the motion with respect to the demand for monetary relief. On March 7, 1991, the district court granted BMWE's motion to dismiss BN's demand for monetary relief, and entered a final judgment. After the district court granted a motion to reconsider, and amended the permanent injunction, BN timely noticed this appeal from the order granting BMWE's motion to dismiss the demand for monetary relief.

II. DISCUSSION

On appeal, BN contends that the district court erred in dismissing its demand for monetary relief. The district court granted BMWE's motion to dismiss on the authority of this Circuit's decision in *Louisville & Nashville Railroad Co. v. Brown*. BN contends that the district court incorrectly applied *Brown* to the facts of this case. BN argues alternatively that, if *Brown* does control this case, it should be overruled.

A. The applicability of *Brown*.

In *Brown*, a railroad brought suit against several of its employees seeking damages caused by the employees' inciting a strike that shut down the railroad for three days. On appeal this Court recognized that 45 U.S.C. § 152 First creates a duty on the part of the employees "to exert every reasonable effort . . . to settle all disputes . . . in order to avoid any interruption to commerce

or to the operation of any carrier". The Court held, however, that § 152 First did not create a cause of action for damages caused by an illegal strike.

In this case, BN seeks damages caused by BMWE's short-lived, illegal strike.[6] BN contends that BMWE is liable for the losses suffered by BN due to BMWE's violation of its duty under § 152 First and § 153 First (i) to submit a minor dispute to binding arbitration. BN argues on appeal that *Brown*, which held that damages were not available for a violation of this duty, can be distinguished from the present suit.

BN first attempts to distinguish *Brown* on its facts. Apparently, BN would have this Court limit the holding of *Brown* to situations in which the employer sues individual employees rather than the union. While the factual situations may differ, the holding in *Brown* was not limited to its particular facts. Furthermore, we see no reason to so limit the holding of *Brown*. Indeed, other courts have recognized *Brown* as holding that there is no cause of action against a union for damages for a breach of the § 152 First duty.[7]

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[6] BMWE's strike must be considered illegal in light of the district court's finding that the dispute was minor. BMWE does not challenge this finding.

[7] *See, e.g., Kennedy v. Long Island R.R.*, 319 F.2d 366, 372 n. 7 (2d Cir.), *cert. denied*, 375 U.S. 830, 84 S.Ct. 75, 11 L.Ed.2d 61 (1963); *Maas v. Frontier Airlines, Inc.*, 676 F.Supp. 224, 227 (D.Colo. 1987); and *National Airlines, Inc. v. Airline Pilots Ass'n Int'l*, 431 F.Supp. 53, 54 (S.D.Fla.1976). *See also* Dennis A. Arouca, *Damages for Unlawful Strikes Under the Railway Labor Act*, 32 Hastings L.J. 779, 793 (1981) (In *Brown* the Fifth Circuit "refus[ed] to allow damages to carriers for union violation of sections 2 First and 3").

BN also argues that *Brown* did not consider whether damages could be awarded as part of equitable relief. BN argues that this Court's decision in *United Industrial Workers of the Seafarers Int'l Union v. Board of Trustees of Galveston Wharves,*[8] holds that monetary relief may be awarded as part of the equitable relief ordered by the court. In *Galveston Wharves* the Court awarded back pay to employees who were wrongfully discharged when the carrier unilaterally altered the terms of a collective bargaining agreement without following the procedures dictated by 45 U.S.C. § 156.

Galveston Wharves is inapposite to this case. The monetary award in *Galveston Wharves* was in response to a violation of § 156; *Brown* addressed a violation of § 152 First. The holding of *Galveston Wharves* that monetary relief is available for a breach of § 156 does not conflict with the holding of *Brown* that no monetary relief is available for a breach of § 152 First.[9] Nor do we find that

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[8] 400 F.2d 320 (5th Cir. 1968), *cert. denied,* 395 U.S. 905, 89 S.Ct. 1747, 23 L.Ed.2d 219 (1969).

[9] The duties created by the two sections of the Act are not identical. Section 156 concerns the carrier's and the union's duty to maintain the status quo while negotiating changes in collective bargaining agreements. There are no cases stating that damages are not available to the carrier if the union violates this duty.

Because it considers a different section of the Act, *Galveston Wharves* would not control the outcome of this case even if this Court were considering the issue on a clean slate. Note also that the Court in *Galveston Wharves* did not even mention *Brown,* which indicates that the issues in the two cases were not thought to be related.

BN also suggests that *Franklin v. Gwinnett County Public Schools,* ___ U.S. ___, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992),

the holding of *Brown* is limited to a situation in which the plaintiff classifies the damages as a legal remedy as opposed to an equitable remedy. Regardless of the label attached to the damages sought, the nature of the relief sought in this case is identical with that sought in *Brown* – the railroad wants to recover the money it expended as a result of the illegal strike. *Galveston Wharves* provides no support for BN's position.

While the *Brown* holding did not directly address a violation of § 153 First (i), we find that a violation of this section is within the holding of *Brown*.[10] Section 153 First (i) mandates compulsory arbitration to resolve minor disputes.[11] When an illegal strike occurs over a minor dispute, the employees or the union have violated not only § 152 First but also § 153 First (i). We find that the holding in *Brown* is not limited to the situation in which the carrier fails to plead the violation of the latter section. We are also not aware of any case in which damages have been awarded for violation of § 153 First (i).[12]

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undermines *Brown*. *Franklin* holds that damages are available in a suit under Title IX. Again, even if this Court were considering the issue on a clean slate, *Franklin* would not control.

[10] *See*, Arouca, *supra* note 7, at 792-93 (indicating that *Brown* held that damages were not allowed for a violation of § 152 First or for a violation of § 153).

[11] *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 39, 77 S.Ct. 635, 639, 1 L.Ed.2d 622 (1957).

[12] In *Chicago River* the Supreme Court held that an injunction could issue to enjoin compliance with § 153 First (i); the Court did not address the question of whether damages could be awarded.

This Court previously held in *Brown* that a carrier had no cause of action under the Railway Labor Act for damages caused by an illegal strike. The district court correctly held that the holding in *Brown* controlled the disposition of the present suit.

B. The continued validity of *Brown*.

BN argues alternatively that *Brown* should be overruled. "In this circuit one 'panel may not overrule the decision, right or wrong, of a prior panel' in the absence of en banc reconsideration or superseding decision of the Supreme Court."[13] This Court has never considered the issue en banc.[14] BN has not directed the attention of this Court to any Supreme Court decision holding that monetary relief is available for a breach of the § 152 First duty.[15] Thus, this panel is bound to follow the holding in *Brown*.

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[13] *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991) (quoting *Brown v. United States*, 890 F.2d 1329, 1336 (5th Cir. 1989)) (other citations omitted).

[14] Indeed, in the history of the Railway Labor Act, the *Brown* panel is the only federal appellate court to have considered the question.

[15] There are *no* reported cases awarding damages for the breach of the § 152 First duty. In *Denver & R.G.W.R.R. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 87 S.Ct. 1746, 18 L.Ed.2d 954 (1967), the Supreme Court was presented with a case in which the district court had awarded damages. The only issue decided by the Supreme Court, however, was a venue issue; the Court did not address the issue of monetary relief. On remand to the district court, the case was apparently dismissed with prejudice and the damages were never collected. Thus, *Denver* does not provide any authority for the proposition that monetary relief is

III. CONCLUSION

The district court correctly dismissed the demand for monetary relief on the authority of *Brown*. The decision of the district court is AFFIRMED.

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available.

See also, Harry Lustgarten, *Principles of Railroad and Airline Labor Law* (1984):

> The Railway Labor Act does not specifically authorize a carrier to recover damages for an unlawful strike and there has been no judicial decision indicating that such a right exists. It appears unlikely, moreover, that the courts in the future would be inclined to allow such damages in view of the potential impact it might have upon the unions' ability to represent the employees.

Id. at 157.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BURLINGTON NORTHERN RAILROAD COMPANY,	§	
Plaintiff,	§	CIVIL ACTION
VS.	§	NO. 4-90-463-A
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL,	§	(Filed March 7, 1991)
Defendants.	§	

ORDER

Came on for consideration the motion of defendants, Brotherhood of Maintenance of Way Employes, Ben Ochoa, E. R. Spears, Paul S. Swanson, and Bruce G. Glover, to dismiss plaintiff's claim for damages or other monetary relief. The court, having considered the motion, the response of plaintiff, Burlington Northern Railroad Company, thereto, and the record as a whole, finds that the motion is well-taken and should be granted. The law is clear that there is no statutory right of action for damages for breach of a § 2 First Duty under the Railway Labor Act. 45 U.S.C. § 152 First. *Louisville and Nashville Railroad Company v. Brown*, 252 F.2d 149, 155 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958); *National Airlines, Inc. v. Airline Pilots Association International*, 431 F. Supp. 53, 54 (S.D. Fla. 1976).

The court ORDERS that defendants' motion to dismiss plaintiff's claim for damages or other monetary relief be and is hereby granted and plaintiff's claims for monetary relief are hereby denied.

By this order, the court is fully and finally disposing of all remaining claims in this action. By orders dated February 14, 1991, the court granted plaintiff's motion for summary judgment on the issue of permanent injunctive relief and granted plaintiff a permanent injunction. The court further ORDERS that all costs in this action be and are hereby assessed against defendants.

SIGNED March 7, 1991.

/s/ John McBryde
JOHN MCBRYDE
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1440

BURLINGTON NORTHERN RAILROAD CO.,
a corporation,

Plaintiff-Appellant,

versus

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES, an unincorporated association,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 05-22-92, 5 Cir., 198_, ___ F.2d ___)

(Filed July 9, 1992)

Before WISDOM, JONES and SMITH, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John Minor Wisdom
United States Circuit Judge

APPENDIX D

Section 2 First of the Railway Labor Act
45 U.S.C. § 152 First

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

APPENDIX E

Section 3 First (i) of the Railway Labor Act
45 U.S.C. § 153 First (i)

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 90-399

CSX TRANSPORTATION, INC.,

PLAINTIFF,

V.

MEMORANDUM OPINION
(Filed MAY 3, 1991)

N.J. MARQUAR, et al.,

DEFENDANTS.

This matter is before the Court upon the defendants' motion for dismissal. The plaintiff, CSX Transportation, has filed this action seeking damages pursuant to the Railway Labor Act (the "RLA"), 45 U.S.C. Sec. 151 *et seq.*,

FACTUAL BACKGROUND

CSX Transportation, Inc. ("CSXT") assigned one of its stationary gangs to begin repairs on a portion of railway located between Cincinnati, Ohio and Louisville, Kentucky on September 10, 1990. In order to perform its duty, this gang was required to work away from its headquarters in Cynthiana, Kentucky.

During the course of this particular job, a dispute arose between CSXT and the labor representative, the

Brotherhood of Maintenance of Way Employees ("BMWE"). The disagreement arose due to the different manner in which CSXT and its workers interpreted a collective bargaining agreement to which both sides subscribed. CSXT provided lunch for the stationary gang by taking orders from members of the gang, sending a truck to pick up lunches, delivering the meals to the work site, and allowing the workers to eat their lunches on the site. Members of the gang asserted the position that, because the work the gang was performing required the members to carry out their duties away from their headquarters, the workers were entitled to be taken, at the expense of CSXT, to a hotel where some of the workers were staying, and be permitted to eat their lunches there.

Without express authorization from BMWE, the Dixie Federation, BMWE's appointed representative, voted to strike over this matter. This strike, which began on September 24, 1990, spread into eight states and CSXT suffered substantial damages as a result. On October 10, 1990, this Court issued a temporary restraining order to prevent any further stoppage of CSXT's operations. CSXT is now asking for the damages it claims it suffered as a result of the strike.

Analysis

On a motion to dismiss, "the allegations of the complaint are generally taken as true." *Hughes v. Rowe*, 449 U.S. 5, 10 (1980). The Sixth Circuit Court of Appeals has emphasized:

> A motion to dismiss based on either lack of subject matter jurisdiction or failure to state a

> claim upon which relief can be granted must be viewed in the light most favorable to the party opposing the motion. Similarly, the Court must accept as true all the well-pled allegations in the complaint under attack.

Great Lakes Steel, Div. of Nat'l Steel v. Deggendorf, 716 F.2d 1101, 1105 (6th Cir. 1983). All factual ambiguities are resolved in favor of the plaintiff's complaint, and "extrinsic evidence cannot be considered in determining whether the complaint states a claim." *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983).

In order to find in favor of CSXT, the Court must first find that BMWE violated the RLA. The RLA provides that employees do not have the option to strike if the matter in dispute is "minor." Viewing the evidence in the light most favorable to CSXT, the disagreement at issue was "minor." Consequently, the employees were not entitled to strike, and the RLA was violated.

The language of the RLA does not explicitly address whether damages are available to a party who has been injured as a consequence of another party's failure to follow the provisions of the RLA. CSXT argues that the RLA purposefully left to the courts the task of developing the remedies for breach of duties imposed by the RLA on unions and carriers.

Since the RLA is silent on the issue of damages, this Court would have to infer a cause of action in order to allow CSXT's suit against BMWE to continue. It has consistently been held that courts shall be allowed a large degree of discretion in interpreting the RLA. For example, courts routinely grant injunctions under the RLA,

even though the language of the Act does not specify injunctive relief. *See Consolidated Rail Corp. v. Railway Labor Executives Ass'n,* 109 S.Ct. 2477 (1989).

Yet, only one court has seemingly allowed damages in favor of a carrier due to a violation of the RLA. *Denver & Rio Grande Western R.R. v. Brotherhood of R.R. Trainmen,* 58 L.R.R.M. (BNA) 2568 (D.Colo. 1965), *rev'd on other grounds,* 367 F.2d 137 (10th Cir. 1966), *rev'd,* 387 U.S. 556 (1967). In this case, a district court awarded damages against a union for injuries that resulted from a strike. The district court's holding was reversed by the Tenth Circuit Court of Appeals, based on venue. On appeal, the United States Supreme Court discussed the damage award, but only in regard to the factual background of the case. The Supreme Court reversed the court of appeals on the venue issue and remanded the case to the district court, whose final decision did not discuss the theory upon which liability was based.

The Fifth Circuit Court of Appeals has specifically addressed this issue and held that no right to recover damages exists under the RLA. *Louisville and N.R.R. Co. v. Brown,* 252 F.2d 149 (5th Cir. 1958). In *Brown* the court refused to imply a damages remedy based in tort directly from the RLA.

Although CSXT criticizes the Court's reasoning in *Brown,* courts have followed its holding. *National Airlines, Inc. v. Airline Pilots,* 431 F.Supp. 53 (S.D. Fla. 1976). The court held that *Brown* was still valid precedent, and it denied an award of damages to a carrier for an invalid strike. The court reasoned that, because Congress had not taken any action that contradicted the result in *Brown,*

Congress must have intended this result. *Id.* at 54. The *National Airlines* court also rested its findings on the often stated proposition that allowing a carrier to seek damages from a union would be giving carriers a weapon which they could use to keep unions "in line" and therefore upset the balance of power. *Id.*

Recently, in *Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employees, et al.*, No. 4-90-463-A (March 7, 1991), the United States District court for the Northern District of Texas dismissed the railroad's claim for incidental and consequential damages resulting from an apparently invalid strike. The facts, procedural posture, and issues presented in *Burlington Northern* are indistinguishable from the case at bar.

While CSXT makes some very valid arguments, supported by the legislative history and fairness concerns, in favor of allowing damages, this Court is not in a position to allow such relief. In the long history of the RLA, no court has explicitly allowed recovery of money damages in this type of situation. The absence of such case authority, combined with the failure of Congress to intervene and affirmatively approve such remedies, requires this Court to dismiss CSXT's claims.

On this 3rd day of May, 1991.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE